

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 June 2010

Public Authority: Crown Prosecution Service
Address: 50 Ludgate Hill
London
EC4M 7EX

Summary

The CPS was asked to provide information about its civil recovery functions under the Proceeds of Crime Act 2002. It refused, citing the exemption at section 35(1)(a) of the Freedom of Information Act 2000 (the "Act"). The Commissioner concluded that whilst section 35(1)(a) was engaged by the information, the public interest did not support withholding the information and ordered its disclosure. He also decided that the CPS breached procedural requirements of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 31 March 2009 the complainant emailed the CPS to request the following information, in accordance with section 1 of the Act.

"...material held by the CPS in respect of the potential for civil recovery functions under the Proceeds of Crime Act 2002 being carried out by the Director of Public Prosecution for England and Wales".

3. The CPS replied by email on the same day, stating that information about its role in respect of recovery functions under the Proceeds of Crime Act 2002 could be found in CPS Legal Guidance on its website. The email included a link to the legal guidance section of the website.
4. The complainant also replied to the CPS on 31 March 2009, stating that the information linked to was out of date and incorrect. He clarified his request as follows:

"...the material I seek is...in respect of the reasoning why the CPS was given an ability to take civil recovery proceedings. That type of material will presumably be held by your Policy Branch or by the Central Confiscation Branch...In addition, there will undoubtedly be material in connection with civil recovery which led to the mention of that subject in the CPS Strategic Plan 2008-2011".

5. The CPS replied on 3 April 2009, indicating that the previous email was being treated as a fresh request. It promised to respond by no later than 30 April 2009. On 29 April 2009, it emailed the complainant, stating that it was extending the time limit for compliance, under section 17(2), in order to consider the impact of section 35 (formulation of government policy). It promised to supply its response by no later than 29 May 2009.
6. On 7 May 2009 the CPS issued a refusal notice, stating that the information it held which fell within the terms of the request was exempt from disclosure under section 35(1)(a) of the Freedom of Information Act 2000. Section 35(1)(a) is a qualified exemption, and the CPS set out the public interest arguments it had considered.
7. The CPS identified informing public understanding and encouraging involvement and debate, which may increase public confidence and engagement in government, as public interest arguments which supported the disclosure of the information.
8. However, it considered that the public interest favoured the maintenance of the exemption, citing safe space and chilling effect arguments in respect of decision making and advice provision.
9. The notice set out the complainant's rights of appeal against the CPS' decision, supplying postal addresses for further correspondence. The complainant replied the same day, asking for an email address at which he might contact the Freedom of Information Unit (Appeals) to request a review of the request.

10. The CPS replied on 11 May 2009, stating that his email had been taken as a request for an internal review and referred to the appropriate section. It undertook to reply within 20 working days. The complainant responded the same day, setting out arguments as to why the information should be released, and asked that they be forwarded to the person dealing with the review.
11. The CPS replied on 19 May 2009, offering to meet with the complainant to try to resolve his request face-to-face. The complainant responded on 20 May 2009, advising that he required a written response to his request as he hoped to use the information as the basis for an article he was writing.
12. The CPS replied on 22 May 2009, confirming that an internal review of the request would proceed.
13. On 9 June 2009, the CPS wrote to the complainant with the outcome of its review, which was to uphold its original decision.

The Investigation

Scope of the case

14. On 23 June 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the CPS' application of section 35(1)(a).

Chronology

15. The Information Commissioner wrote to the CPS on 30 June 2009, asking it to furnish him with a copy of the withheld information, which it did on 31 July 2009.
16. The information comprised a series of email exchanges, both internal and external, discussing the CPS' response to government proposals to make changes to civil asset recovery of powers, a summary table and a seven page briefing document.
17. On 30 November 2009 the Commissioner wrote to the CPS, asking it to clarify precisely which government policy or policies it considered the requested information related to (as distinct from departmental policies).

18. He also asked the CPS to specify when the formulation/development of the policy or policies had been completed, or clarify whether the formulation/development of the particular policy (or policies) had been ongoing at the time of the request.
19. In order to determine whether the public interest test had been applied appropriately, the Commissioner also asked the CPS to set out the public interest arguments, both in favour of and against disclosure, it had considered in reaching its decision to withhold information.
20. The CPS responded on 2 February 2010. It advised that the requested information was directly related to government policy on the recovery of assets, although it did not outline what that policy was, or its scope or identify how it differed from CPS departmental policy. The CPS also stated that the government decision to give prosecutors the power to conduct civil recovery proceedings was complete at the time the complainant made his request, but that the decision as to how the CPS should organise itself to deal with civil recovery work remained ongoing.
21. The CPS addressed the Commissioner's questions about its consideration of public interest arguments by repeating the explanation included in its original refusal notice (see paragraphs 7 and 8, above). It then went on to comment on the importance of facilitating good working relationships with partner agencies with which it liaises over prosecution functions. It expressed concern that release of the information could undermine or damage these relationships. It also stated that release of the information could prejudice the ability of the state to confiscate assets from organised crime.
22. The Commissioner wrote to the CPS on 26 April 2010, stating that the information it had provided in its letter of 2 February 2010 led him to believe that section 35(1)(a) was not engaged by the requested information. The Commissioner advised that the information should be released in line with the complainant's request, if the CPS were unable to supply more compelling arguments as to why it was exempt from disclosure.
23. The CPS wrote acknowledging receipt of the letter on 11 May 2010. It undertook to respond as soon as possible.
24. The Commissioner wrote to the CPS on 17 May 2010, asking for a full response by 24 May 2010.

25. The CPS replied on 21 May 2010, advising that the letter of 26 April 2010 had arrived three days before it moved offices, and asking for further time to consider the matter.
26. The Commissioner responded on 24 May 2010, asking for a response to be supplied by no later than 11 June 2010.
27. The CPS responded on 16 June 2010. It reiterated that section 35(1)(a) had been correctly applied, provided further information about the government policy to which the information related and maintained that the public interest favoured maintenance of the exemption over disclosure.
28. The CPS also submitted, for the first time, a claim that the requested information was covered by the exemption at section 36(2)(b)(i), 36(2)(b)(ii) and section 36(2)(c), stating its intention to claim the exemption if the Commissioner did not agree that section 35(1)(a) was engaged. It stated chilling effect and safe space arguments in support of the exemption, as well as concerns that disclosure would be damaging to good working relationships with partner agencies with which it works very closely.
29. The CPS identified the qualified person as being the Director of Public Prosecutions and affirmed that it was his opinion that the subsections were engaged. It did not clarify the extent to which the qualified person had been involved in the process of arriving at the decision to apply section 36 or what material had been consulted in reaching the decision.
30. The CPS set out public interest arguments which focussed on the harmful impact disclosure would have on its ability to prosecute and seize criminal assets.

Analysis

Exemptions

Section 35(1)(a)

31. Consideration of this exemption is a two stage process. Firstly, in order for the exemption to be engaged, the information in question must relate to the formulation or development of government policy. Secondly, this exemption is qualified by reference to the public

interest. If the public interest does not favour maintenance of the exemption, the information should be disclosed.

32. The exemption applies in respect of information which is held by a government department if it relates to the formulation or development of government policy. It is a class-based exemption. This means that if, as a matter of fact, information falls within any of the categories listed within it, it is exempt.
33. The Commissioner recognises that the thinking behind the exemption is that it is intended to prevent harm to the internal deliberative process of policy-making. The arguments for maintaining the privacy of such information are essentially that the threat of public exposure of this information will lead to less candid and robust discussions about policy, a fear of exploring extreme options, hard choices being avoided, and good working relationships and the neutrality of the civil service being threatened. Ultimately the quality of government policy making could be undermined.

What is 'policy'?

34. Policy is not a precise term and to some extent what is regarded as policy depends on context. However, there is a general consensus that policy is about the development of options and priorities for ministers, who determine which options should be translated into political action and when. Policy is unlikely to include decisions about individuals or to be about purely operational or administrative matters.

Government policy

35. For the exemption to apply, the information must relate to government policy as distinct from 'departmental policy' or any other type of policy. This suggests that it is policy which requires Cabinet input, or represents the collective view of ministers or that it applies across government. This also suggests that it is a political process. Departmental policy will frequently be derived from government policy; however, where a departmental policy applies only to the internal workings of the department it would not be caught.

Does the withheld information relate to the formulation and development of government policy?

36. The CPS provided no explanation in its refusal notice to the complainant as to why the exemption applied. It subsequently advised the Commissioner that the exemption applied because the requested information was directly related to a government policy decision as to

which organisation should be responsible for the civil recovery of assets, a responsibility which had previously lain with the Assets Recovery Agency. It particularly focussed on the policy as to which types of cases would be best pursued and contained proposals as to how that policy should be delivered.

37. The withheld information appears to document the CPS' response to (then live) government proposals to move Asset Recovery Agency work to the Serious Organised Crime Agency. It addresses questions of how the CPS should organise itself in respect of asset recovery and the potential benefits and disadvantages to it of seeking changes to the Proceeds of Crime Act 2002. It makes broad recommendations about how the CPS should proceed in respect of its powers of civil recovery actions, as well as seeking assurances on certain issues prior to offering its support to any merger.
38. The Commissioner considers that the information relates to underlying government policy on the reassignment of recovery work and that it records something about the policy process. He is therefore satisfied that it relates to the formulation and development of government policy and that the exemption at section 35(1)(a) is therefore engaged.

Public interest arguments in favour of disclosing the requested information

39. The CPS identified informing public understanding and encouraging involvement and debate, which may increase public confidence and engagement in government, as public interest arguments which supported the disclosure of the information. In particular it acknowledged that release of this particular material would mean the public has a better understanding of the reasoning behind the decisions on which organisations the civil asset recovery function should sit with.

Public interest arguments in favour of maintaining the exemption

40. There could be a 'chilling effect' if this information was disclosed: i.e. those who contribute to policy making may be reluctant to do so in the future if they believed that their contributions would be disclosed under the Act. This could inhibit the free and frank discussion of all options, and damage the quality and candour of communications between officials. This might lead to poorer quality advice and less well formulated policy and decision making in future.

41. Ministers and officials also need to be able to conduct rigorous and candid risk assessments of their policies and programmes, including considerations of the pros and cons, without there being premature disclosure which might close off better options. Such a 'safe space' also allows those involved in policy making to 'think the unthinkable' and use imagination without the fear that policy proposals will be held up to ridicule.
42. The impartiality of the civil service might be undermined if advice was routinely made public, as there is a risk that officials could come under political pressure not to challenge ideas in the formulation of policy, thus leading to poorer decision making.
43. The CPS also highlighted the following specific reason why disclosure of the information in this case would not be in the public interest. The discussions included candid comments about other agencies. Its working relationship with these agencies could be seriously undermined if the information was disclosed. The CPS emphasised the public interest in maintaining good working relationships with agencies with which it worked closely on prosecution matters.

Balance of the public interest arguments

44. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of the Tribunal in *DFES v Information Commissioner and Evening Standard* (EA/2006/0006) along with the more recent comments contained in High Court judgments in which the DFES decision was referenced.
45. In particular, the Commissioner has considered key two principles outlined in the DFES decision. The first was the importance of the timing of the request when considering the public interest in relation to section 35(1)(a):

"Whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for example it would expose wrongdoing in government. Both ministers and officials are entitled to hammer out policy without the...threat of lurid headlines depicting that which has been merely broached as agreed policy."

46. The second being:

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case" (Para 75(i)).

47. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption.
48. With regard to the chilling effect arguments, the Commissioner notes that these arguments can encompass a number of related scenarios:
- disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will make future contributions to that policy;
 - the idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates; and,
 - finally, an even broader scenario where disclosing information relating to the formulation and development of a given policy (even after the process of formulating and developing that policy is complete), will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates.
49. The CPS stated in its letter of 2 February 2010 that by the time the complainant submitted his request in March 2009 the government's decision to give prosecutors the power to conduct civil recovery proceedings was complete, although the decision as to how the CPS should organise to deal with civil recovery work was ongoing. The most recent item of withheld information is dated late 2007. Therefore, the Commissioner has concluded that it is only the last of the three chilling effect scenarios which is relevant to this case.
50. The Commissioner accepts that the chilling effect arguments should not be dismissed lightly. Nevertheless, the Commissioner believes that a public authority still has to provide some case specific evidence which supports its application of the chilling effect arguments. In this case, the CPS has simply asserted that disclosure of the withheld information may have a chilling effect on the formulation of future policies.

51. Whilst the Commissioner accepts that the content of the withheld information does in places contain genuinely free and frank comments, he does not believe that the CPS has sufficiently demonstrated how disclosure of this information would have a significant chilling effect on future policy formulation or development. Therefore, whilst the Commissioner believes that the chilling effect argument deserves some weight, he does not believe that it should be given any significant weight in this case.
52. With regard to the arguments surrounding safe space, the Commissioner again notes that by the time the request had been submitted, the government's policy formulation and development had been completed, and the CPS was in an implementation phase. As safe space arguments focus on providing a private space in which to develop live policy, and in this case by the time of the request the policy was no longer live, the Commissioner does not believe that the safe space argument deserves to be given any particular weight.
53. In relation to the argument that the disclosure of the withheld information could harm the impartiality of the civil service, the Commissioner notes the comments of the Tribunal in a number of cases where similar arguments were advanced. In respect of a change of behaviour by politicians towards civil servants if information were to be disclosed, the Tribunal was clear that the public is entitled to expect a substantial measure of political sophistication and fair-mindedness from politicians and it would therefore be correct to proceed on the assumption that Ministers will behave fairly towards officials, regardless of the decisions particular civil servants have taken in the past. To do otherwise, as the Tribunal suggested, *"would plainly betray a serious misunderstanding of the way the executive should work. It would, moreover, be wholly unjust"*. Similarly, with regard to a change in the behaviour of civil servants towards politicians resulting from disclosure of the information, the Commissioner notes the comments of the Tribunal in *DCMS v The Information Commissioner (EA/2007/0090)* at paragraph 40:

"...some emphasis was placed in cross examination on the role of professional integrity and the standards required in the Civil Service code as a bulwark against possible degradation of relationships between Ministers and civil servants caused by the possibility of their communications being disclosed under FOIA, including the integrity of advice and record keeping."

54. The Commissioner's position is that whilst he would accept that, if civil servants *did* come under political pressure not to challenge ideas in the formulation of policy, this would compromise the effectiveness and

neutrality of the civil service, as with chilling effect arguments he agrees with the Tribunal's position that the standards that we should realistically be able to expect from both officials and politicians should limit this effect. Therefore, as the CPS has failed to identify specific and convincing arguments in this case, the Commissioner has not attributed any particular weight to this argument.

55. Whilst the Commissioner accepts that the content of the withheld information does contain, in places, genuinely free and frank comments about partner agencies, he does not believe that the CPS has sufficiently demonstrated how disclosure of this information would have a significant and negative impact on its relationships with those agencies, compiled as it was against a backdrop of the CPS robustly defending its position in the face of possible changes to its delegated powers and budget. Therefore, he does not believe that it should be given any significant weight in this case.
56. With regard to attributing weight to the public interest factors in favour of disclosure the Commissioner recognises that they are ones which are regularly relied upon in support of the public interest in favour of disclosure, i.e. they focus on openness, transparency, accountability and contribution to public debate. However, this does not diminish their importance as they are central to the operation of the Act and thus are likely to be employed every time the public interest test is discussed. Nevertheless, the weight attributed to each factor will depend upon a number of circumstances, again the key ones being the content of the information and the timing of the request.
57. Having considered the content of the information the Commissioner believes that disclosure of the withheld information would genuinely inform the public about the CPS's response to government proposals to alter its work.

58. This is because the withheld information contains, in the Commissioner's opinion, an assessment of policy options and the rationale for choosing particular courses of action. Consequently the Commissioner believes that disclosure of the information would also reassure the public that such a sufficiently rigorous review had been undertaken.
59. In conclusion, in the Commissioner's opinion the arguments in favour of maintaining the exemption do not outweigh the public interest in disclosing the information. In reaching this finding the Commissioner would emphasise the fact that generic arguments advanced by the CPS in favour of the maintenance of the exemption have not, in his opinion, been backed up by case-specific evidence beyond the suggestion that relationships with partner agencies might be affected by candid discussions about them. In contrast, the Commissioner believes that the content of the withheld information would genuinely inform the public about CPS' response to government proposals to alter its work.

Section 36

60. At a late stage in the investigation, the CPS signalled its intention to claim that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) applied in respect of the requested information, should the Commissioner be unable to agree that section 35(1)(a) was engaged by the information. The Commissioner considers that the information is exempt under section 35 because that section is engaged, but that the balance of the public interest does not favour maintaining the exemption. It is therefore not appropriate for him to go on to consider section 36, since section 36(1)(a) provides that section 36 only applies to:

(a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35...'

Procedural Requirements

61. The CPS failed to provide information to the complainant that the Commissioner has concluded was not exempt. It therefore breached section 1(1)(b) of the Act. In addition, since the CPS failed to provide the information within the statutory time limit it also breached section 10(1) of the Act.

The Decision

62. The Commissioner's decision is that by claiming that the information covered by the request was exempt from disclosure by virtue of section 35(1)(a), the public authority did not deal with the request for information in accordance with the Act. He also finds that the CPS breached sections 1(1)(b) and 10(1), as explained above.

Steps Required

63. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- to disclose to the complainant the withheld information, redacting the names of junior members of staff who have a non-public facing role.
64. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

65. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

66. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 28th day of June 2010

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Refusal of Request

Section 17(2) states –

"Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy

Prejudice to effective conduct of public affairs.

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.